IN THE CIRCUIT COURT OF NORFOLK COUNTY, VA.

KINDRED BAUGHAM, Administrator, *v.* NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY.

December 3, 1913.

1. Master and Servant—Assumption of Risk.—Assumption of risk grows out of the contract of service. The law reads into the contract the implied conditions that the servant will assume all the ordinary risk incident to the employment, and by reason of which he knows or by the exercise of ordinary care ought to know during the course of his employment.

2. Master and Servant—Assumption of Risk—Distinguished from Contributory Negligence.—Assumption of risk is a matter of contract, while contributory negligence is a matter of conduct. A person assumes the risk at a period of time anterior to or remote from that at which the accident happened, while a person cannot be guilty of contributory negligence unless his negligent conduct takes place immediately, or almost immediately, at the time of the accident.

3. Master and Servant—Assumption of Risk—Federal Employers' Liability Act.—The Federal Employers' Liability Act in a negative way recognizes the common-law of assumption of risk. If this defense were denied, an injured servant's right of recovery would be absolute and the only duty of the jury would be to assess damages. The statute, however, does not warrant that construction. The doctrine of the assumption of risk is still available to a defendant in an action brought under the Federal Employers' Liability Act, unless it be shown that he is guilty of some violation of a statute designed for the safety of the servant.

4. Master and Servant—Assumption of Risk—Inexperienced Servant.—A new servant, while he assumes all the ordinary risk incident to the employment at large of which he has knowledge, or of which by the exercise of ordinary care he may have knowledge, is given a reasonable time to ascertain what those risks are. The reasonableness of such time is a question to be determined by the jury.

5. Master and Servant—Assumption of Risk—Questions of Law and Fact.—Persons who have had no opportunity to familiarize themselves with the environments into which they have been called are taken out of the rule that they assume the risk, as a matter of law, and are permitted to go to the jury upon that question.

6. Master and Servant—Federal Employers' Liability Act—Quere.—As to whether a federal statute is meant, or whether a state statute is included in the language, quere.

7. Master and Servant—Pleading.—In an action under the Federal Employers' Liability Act, the allegations in the declaration allege that the plaintiff, a young man nineteen years of age, engaged him

self as a brakeman with the defendant company, that he was inexperienced and was in ignorance of the dangers attendant upon that employment, that he had been in the employment only one day, that no instructions were given him with reference to the duties he was required to perform, that no warning was given him of the peculiar dangers with which he was surrounded, that there arose a duty on the part of the defendant to use reasonable care to provide a reasonably safe place to work in the physical construction of the defendant's tracks, and that by reason of their negligent proximity and converging character, they became so dangerous as to occasion accident without fault on the part of the plaintiff. Held, the declaration is good on demurrer.

8. **Statutes—Construction.**—The court will not read into a statute a prohibitory cause which the legislature might easily have inserted, but did not see fit to do so.

9. **Common Law—As Part of Federal Jurisprudence.**—Unless the common law be recognized at least to some extent by the State courts as a part of the federal jurisprudence such courts would be bound hand and foot in administering justice under the Federal Employers' Liability Act.

10. **Pleading—Demurrer.**—On demurrer to a declaration the defendant admits to be true all the allegations that are well pleaded.

11. **Pleading—Sufficiency of Declaration.**—A declaration sufficient a. common law is sufficient under the Federal Employers' Liability Act. The sufficiency of a pleading at common law is the proper test under the statute.

OPINION.

JOSEPH T. LAWLESS, J.: I think it well, gentlemen, that the court should now give its views with reference to the two questions which were involved in the discussion on the demurrer to the declaration. That is to say, whether or not the allegations in the declaration are sufficient in law, and, whether or not, under the Federal Liability Act of 1908, the common law doctrine of the assumption of the rick has been abolished, as contended for by counsel for the plaintiff, or whether it is limited to those cases which are embraced in § 4 of that Act by its terms.

The declaration in this case embraces three counts. I think, however, that the first and the third counts in the declaration are essentially the same. The first count, omitting the formal part, and the usual repetitions alleging the relationship subsisting between the parties, charges that the duty growing out of the relationship was one to instruct and warn an inexperienced servant of the danger of his employment, before requiring him to perform his duties.

Upon a close comparison of that count with the third count

the only substantial difference I find is in the addition of the words on page twenty-three of the declaration "Float or landing stage appurtenant to the said dock." In other words, the third count is in identically the same language as the first count, except that instead of the allegation "That the float or barge No. 14 was then and there moored and made fast to the said dock," as appears in the first count, it is alleged, on page twenty-three of the third count "It was moored and made fast to the said float or landing stage appurtenant to said dock." So that, so far as the two counts are concerned, as to the duty, and as to the failure to discharge the duty, they are substantially the same, and will be so considered by the court in whatever it has to say upon this demurrer to the declaration.

The second count, after reciting the relationship, alleges that the duty arising therefrom was one to use ordinary care to provide a reasonably safe place to work. The breach of that duty in certain particulars is charged in the usual language. On the demurrer to the declaration, upon familiar principles, the defendant admits all of the allegations that are well pleaded to be true. Assuming that state of facts, the case presented in the first count is this: A young man of the age of nineteen years engaged himself as a brakeman with the defendant company. It is alleged he was inexperienced, and was in ignorance of the dangers attending upon that employment. It alleges he had been in the employment only one day. It alleges that no instructions were given him with reference to the duties he was required to perform, and no warning given him of the peculiar dangers with which he was surrounded. In the second count out of the peculiarities of the dangers recited, it is alleged there arose a duty on the part of the defendant company to use reasonable care to provide a reasonably safe place to work in the physical construction of the tracks; that by reason of their negligent proximity and converging character, they became so dangerous as to occasion accident without fault on the part of the plaintiff. That is the substance of the complaint stated in my own language, as it appears on the demurrer to the declaration. The conclusion I have reached, after having examined our own authorities and those cited on yesterday, is that this is a sufficient declaration on both counts under the Federal Statute, and is sufficient under the Federal Statute because of its sufficiency at common law. I know of no other standard by which to test it. It is unnecessary, in passing upon the demurrer, for the court to commit itself to any extended view with reference to the point raised by counsel on yesterday, as to whether or not the common law is a part of the Federal system of jurisprudence. It does appear to me, however, that unless it be so recognized at least to some extent by

the state courts, they would be bound hand and foot in administering justice under this Federal law. It is undoubtedly thus recognized by the Federal courts under the former practice. The Federal statute, itself, in a negative way, recognizes the common law doctrine of assumption of the risk in this class of cases. If this defense is denied, the right of recovery of an injured servant would be absolute and the only duty of the jury would be to assess the damage. The statute does not warrant that construction. Nor do I think it necessary to discuss at length the point raised by counsel in the argument on yesterday, as to whether or not § 4 of the Federal Act revives by implication the common law defenses. Certainly the terms of that section do not take away whatever defense of that nature was available to the defendant company in this class of cases. That defense is yet available to them, in my opinion, with the exception enumerated in the statute, namely: Unless there is a violation of some safety appliance act. In other words, I am of opinion that the doctrine of the assumption of risk is still available to a defendant in an action brought under the Federal Employers' Liability Bill, unless it be shown that the defendant had been guilty of some violation of a statute designed for the protection of servants. And that brings up the suggestion raised by Mr. Peterson, as to whether a Federal Statute is meant, or whether a state statute might be included in the language. Upon that point I desire to pass no opinion. I have no opinion to express on it. I think it is unnecessary in this case to go further than to say, that the doctrine of the assumption of the risk, as at common law, is still available, unless there has been some violation on the part of the defendant company of a safety appliance act.

In considering whether or not this declaration is sufficient, I have not been unmindful of the purpose of the Act itself, which is largely designed to abrogate the common law doctrine as to certain defenses. Whether the Act of Congress designedly left open this defense of the assumption of the risk, or whether it did so by inadvertence need not be now considered. I merely remark that it does seem to me, if the legislature, the national legislature, intended to abolish absolutely the doctrine of the assumption of risk, it would have said so in so many words. I think that § 4 of the Act, in its concluding words, makes it clear that a defendant company is still left to this defense, as it is at common law, unless it has been guilty of some violation of a safety appliance act. To hold otherwise would be, in my view, judicial legislation—a reading into the statute of a prohibitory clause which Congress might easily, but has not seen fit, to insert.

I find that in 1 Labatt on Master and Servant, in note C to § 42A and also to § 43A, the note to be found on pages 1105, 1108,

1109 and 1110, that a distinction is drawn between the assumption of the risk of a minor, and one who is an adult. Upon an examination of the cases cited there, you will find that injuries to a minor, and especially those who have had no opportunity to familiarize themselves with the environments into which they have been called, are taken out of the general rule that they assume the risk, as a matter of law, and are permitted to go to the jury upon tha question. Not only is that so in Labatt, but it is also true in the work of Judge Thompson on Negligence. I find the same doctrine as to the assumption of the risk is laid down in Fourth Thompson, § 4280, and White's supplement thereto at § 4282. I find, also, that doctrine is recognized by our own court in the Cheatwood case, 103 Virginia, and the Newton case, 105 Virginia, where there has been little or no opportunity given to brakesmen to become familiar with the risk they are about to assume. I find, also, that the same doctrine is laid down by Sherman and Redfield on Negligence, even in the class of cases wherein the plaintiff was an adult. In other words, our court is committed now, as I understand the law, to the doctrine that a new servant, while he assumes all of the ordinary risks incident to the employment at large that he knows, or by the exercise of ordinary care ought to know, is yet given time—reasonable time, to be determined, of course, by the jury—to ascertain what those risks are.' So that, it appears to me, the allegations in the declaration which recite the facts I have already gone over, which make the usual allegation of duty and of negligence, which deny knowledge on the part of the plaintiff, and affirm it on the part of the defendant, make the declaration good.

I am, therefore, of opinion to overrule the demurrer to the declaration, and at the proper time I will also be prepared to give an instruction to the jury on the question of the assumption of risk in accordance with the views I have expressed.

As to the distinction, gentlemen, between the doctrine of assumption of the risk and contributory negligence, as distinct defenses—that was touched on during the argument. I find in one of the authorities cited to me by Judge Willcox: Central Vermont Railway Company *v.* Bethune, 206 Federal 868, Judge Putnam holds in direct contravention of the view I have always held, with reference to the distinction between those two classes of defense, namely: That assumption of the risk is a matter of contract, and that contributory negligence is a matter of conduct. I am of opinion that assumption of the risk grows out of the contract of service. The law reads into the contract this implied condition (which, as a matter of practice, the servant, of course, knows nothing of) that he will assume all of the ordinary risks incident to the employment, and all risks which he knows,

or by the exercise of ordinary care ought to know, during the course of his employment. It appears to me that is the true rule with respect to the assumption of the risk, and that contributory negligence is always a matter of conduct which takes place at or about the time the accident happens. In other words, in my view of the law, a man assumes the risk at a period of time anterior to or remote from that at which the accident happened; and a man can not ordinarily be guilty of contributory negligence unless his negligent conduct takes place immediately, or almost immediately, at the time of the accident. A general discussion of this differentiation will be found in the case of Davis Coal Company *v.* Pollard, 62 Northeastern 492, 92 American State Report 319. The opinion there by Judge Baker, of the Indiana court, I think it was, is very interesting, and very clear, and it appears to me expresses the true difference between the two defenses. Judge Thompson's illustration of it is this, in his Commentaries on the Law of Negligence: If a brakeman attempts to couple two cars, and without negligence stumbles over the track, and falls between the cars and is injured, he can not recover for the reason that he assumed that risk. It is one of the ordinary hazards of the employment. If, under the same circumstances, he negligently used the coupling rod, for example, or omitted to use the coupling rod provided for that work by the master, that would be a matter of contributory negligence. Judge Cardwell, in the Cheatwood case, gives this illustration of the two defenses: Assumption of the risk consists in handling a defective appliance without negligence; contributory negligence consists in handling a safe appliance negligently. I think, however, that those illustrations, while sound, state, so far as the assumption of the risk doctrine is concerned, the *result* of that doctrine instead of the origin of it.

I do not know, gentlemen, that I can make the views of the court clearer by extending my remarks.

Note.

As to assumed risk this section of the federal act is controlling with respect to any different or contrary State rule, in cases which the federal act applies, whether such State rule be common law or statutory. Richey on Federal Employers' Liability Act, p. 41.

"In order to state a cause of action under the federal act, it is essential that the plaintiff's pleading shall allege that the defendant, at the time of the injury, was a common carrier engaged in interstate commerce by railroad, and it should further allege the facts showing that the plaintiff, or the deceased, was injured while employed by the defendant in connection with such commerce." Id., p. 129.